

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**MIDLAND PROPERTY PARTNERS, LLC,
RESPONDENT**

vs.

**RICHARD WATKINS,
APPELLANT**

DOCKET NUMBER WD76027

DATE: NOVEMBER 5, 2013

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable James Kanatzar, Judge

Appellate Judges:

Division Two: Mark D. Pfeiffer, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

Attorneys:

Ryan L. White, for Respondent

John M. Duggan, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

MIDLAND PROPERTY PARTNERS, LLC, RESPONDENT

v.

RICHARD WATKINS, APPELLANT

WD76027

Jackson County, Missouri

Before Division Two Judges: Mark D. Pfeiffer, Joseph M. Ellis and Victor C. Howard, JJ.

In 2006, Appellant Richard Watkins organized a limited liability company with Midland Property Partners, LLC, Gary Jenkins, the Mark Horstmann Revocable Trust, and the Betty Horstmann Revocable Trust (collectively, "Respondents"). In 2009, additional capital was needed for MCI's continued operation, but Appellant was unable to pay his required share of the additional capital. Thus, Appellant drafted and executed four promissory notes ("the Notes") in exchange for Respondents agreeing to advance his share of the deferred capital contribution to MCI. Each of the four Notes was made payable to one of Respondents and provided that Appellant would repay the amount of the Note plus interest within one year. The Notes further provided that, upon default, Appellant must pay "all reasonable costs incurred by [Respondents] in collecting or enforcing payment [of the Notes]."

In addition to the Notes, Appellant also executed four continuing limited guaranties ("the Guaranties"). Each Guaranty had the corresponding Note attached to it as an exhibit. Each Guaranty also contained a jury waiver provision that provided that Appellant, the guarantor, "expressly waived the right to trial by jury in any action or proceedings instituted against Guarantor or any other person liable on the note." The Guaranties further provided that the Respondents were relying upon the Guaranties in extending credit to Appellant.

When Appellant failed to make any payments on the four Notes, Respondents sued him for breach of promissory note. Appellant denied the allegations in Respondents' petitions and brought several counterclaims against Respondents in which he alleged that Respondents violated several provisions of MCI's operating agreement. Prior to trial, the trial court dismissed Appellant's counterclaims upon determining that those claims must be arbitrated pursuant to the arbitration provision in MCI's operating agreement, which provided that "all disputes and controversies between any of the Members and/or Managers relating to the subject matter of [MCI's operating a]greement shall be resolved by arbitration" The trial court also granted Respondents' motion to strike Appellant's demand for a jury trial based upon the jury waiver provision contained in the Guaranties.

Following a bench trial, the trial court awarded each Respondent the amount due under their respective Note plus interest and attorneys' fees. The trial court also dismissed Appellant's request for a set-off and granted Respondents' motion to amend the pleadings to conform to the evidence. Appellant raised four points of error on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED

Division Two holds:

(1) The trial court did not err in striking Appellant's demand for a jury trial because, although the Notes themselves do not contain a jury waiver provision, Appellant knowingly and voluntarily relinquished his right to a jury trial in that Appellant drafted the Notes and the Guaranties, the Guaranties contain explicit jury-waiver provisions, those jury-waiver provisions specifically reference actions and proceedings instituted against those liable on the Notes, the Guaranties expressly state they served as a material inducement in procuring the Notes' execution, and Appellant contemporaneously signed and executed all the Notes and Guaranties in his individual capacity.

(2) The trial court did not err in finding that Respondents were entitled to enforce the Notes against Appellant because there is substantial evidence in the record to support the trial court's finding that, although Respondents were not in possession of the Notes at the time of trial, they were still entitled to enforce them in that Respondents once possessed the Notes, they had not transferred their respective interests in the Notes, and the Notes' current whereabouts could not be determined, despite Respondents' efforts to do so.

(3) The trial court did not abuse its discretion when it granted Respondents' motion for leave to amend their pleadings to conform to the evidence pursuant to Rule 55.33(b) because, despite Appellant's objections to the introduction of evidence regarding the Notes' whereabouts, Appellant failed to establish how he would be prejudiced by Respondents amending their petitions to include such evidence in that the amendments to the pleadings would not change the substance of Respondents' petitions, Appellant admitted he had executed the Notes, and the terms of the Notes were not in dispute.

(4) The trial court did not err in dismissing Appellant's request for a set-off because Appellant's set-off request stemmed from Respondents' alleged violations of MCI's operating agreement, and the broad arbitration provision in MCI's operating agreement purported to encompass "all disputes and controversies between any of the Members and/or Managers relating to the subject matter of [the operating a]greement." Thus, the trial court did not err when it determined it was without authority to address the set-off issue on the basis that it fell squarely within the scope of the operating agreement's arbitration provision and, therefore, was an issue for arbitration.

(5) The trial court erred in awarding attorneys' fees to Respondents because the Notes did not contractually provide for attorneys' fees in that the phrase "all reasonable costs" does not expressly authorize the recovery of attorneys' fees and, thus, cannot be the basis for an award of attorneys' fees.

Opinion by: Joseph M. Ellis, Judge

Date: November 5, 2013

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